

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



76-2163-4

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

KENNETH WILLIAM SCHAFFER

VS:

CARL ROBINSON, WARDEN, CONNECTICUT  
CORRECTIONAL INSTITUTION AT SOMERS.  
CONNECTICUT

On Appeal from the United States District  
Court for the District of Connecticut

BRIEF OF THE RELATOR - APPELLANT,  
KENNETH WILLIAM SCHAFFER

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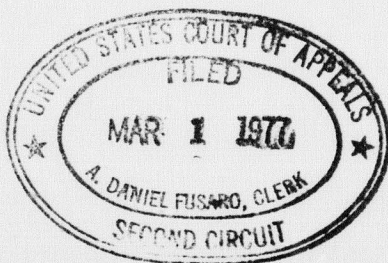


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BRIEF OF THE PLAINTIFF -  
RELATOR KENNETH WILLIAM SCHAFFER

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STATEMENT OF ISSUES

1. Did the United States District Court err by upholding the validity of the bench warrant issued against Petitioner Schaffer pursuant to Connecticut General Statutes Section 54-43 which is unconstitutional on its face?
2. Did the District Court err by denying the claim of Petitioner Schaffer that he was subjected to unconstitutional searches and seizures of his motor vehicle?
3. Did the District Court err when it failed to find that statements made by Petitioner Schaffer to police officers while a suspect and entered into evidence were not violative of MIRANDA V. ARIZONA 384 U.S. 436 (1966)?
4. Did the failure of the District Court to grant an evidentiary hearing pursuant to 28 U.S.C. Section 2254 (d) constitute error?
5. Did the District Court err by refusing to grant the claim of Petitioner Schaffer that through mistake of counsel there was no Motion for Change of Venue in order that the Petitioner could be tried by a jury of his peers?

STATEMENT OF THE CASE\*

The Petitioner-Appellant Schaffer contends that the District Court should not have dismissed his applications for writs of habeas corpus. Because the petitions indicate that evidence was entered contrary to MIRANDA and produced by warrantless searches and seizures, the District Court should have granted the Petitioner's Motion for an Evidentiary Hearing pursuant to 28 U.S.C. Section 2254 (d). Furthermore, it should have allowed the Petitioner, a black man, the opportunity to litigate the issues that state appointed counsel, by mistake did not protect his right to a trial by jury of his peers. Tolland County, Connecticut, where the Petitioner was to be tried is almost 100% white in its racial composition. Rather than asking for a change of venue to Hartford County where there is a substantial non-white population, Court appointed counsel withdrew the jury claim and proceeded to

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\*In this brief references to the joint appendix are introduced with the letter "A"; references to the addendum are introduced with "addendum", and references to the trial transcript included in the addendum are introduced with the letter "T".

trial before a three judge panel.

Of fundamental importance, was the District Court's failure to declare the statute under which the Petitioner was arrested unconstitutional. Connecticut General Statutes, Section 54-43 does not require a bench warrant to be supported by an oath or affirmation as mandated by the United States Constitution, Fourth Amendment.

At the State trial, evidence was admitted over the objection of Schaffer's counsel which was, one, the fruit of an interrogation conducted without MIRANDA warnings and two, the fruit of a warrantless search and seizure beyond the scope of consent allowed by Schaffer. In fact, a warrant was later obtained to justify this search and seizure.

Proceedings Below:

Two applications for Writs of Habeas Corpus were filed. The first, H-75-128 was filed pro se April 7, 1975 (A1-7), and the second also pro se was filed April 14, 1975 (A8-11).

In H-75-128 which was amended by counsel June 22, 1976 (A12-14), it claims failure to give MIRANDA warnings, the illegality and detention under

the state bench warrant statutes, the failure of Court appointed counsel to move for a change of venue to insure a fair jury trial and other issues concerning grand jury arraignment and pre-hearing disclosure of witnesses.

Petition H-75-129 which was also amended by Counsel June 22, 1976 (A15-17). This petition also claims failure to advise pursuant to MIRANDA. However, this petition additionally requests relief from illegal searches and seizures. The discretion of the trial court was challenged regarding the admission of a photograph of the slain victim's body, a road test of Schaffer's automobile at the site of the crime, and the testimony of a lay witness concerning the composition of a dried red substance found in Schaffer's automobile.

In returns filed July 20, 1976, the state admitted MIRANDA warnings were not given, but need not have been. Further the State responded that the Petitioner had consented to the search and seizure of his vehicle, that the bench warrant issue was not fully litigated in the State Courts, that the grand jury questions were without merit and that the testimony and exhibits concerning physical evidence did not raise questions of

"constitutional dimension (A18-20,21-22)".

The Petitioner then filed his respective traverses August 12, 1976 (A21-25,26-27) which denied the respondent's answer. At the same time the Petitioner moved for evidentiary hearing on both matters pursuant to 28 U.S.C. Sec. 2259(d) (A28,29). These motions were never argued at short calendar, rather the District Court without prior notice, dismissed both petitions in its Memorandum filed September 21, 1976 (A30-34). Judgment was subsequently entered on both petitions September 29, 1976 (A35,36). From this judgment, the Petitioner Schaffer appeals to this Honorable Court.

#### STATEMENT OF FACTS

This Appeal from the District Court's denial of the Plaintiff's petition for Writ of Habeas Corpus represents one of the final stages in the long judicial process begun July 4, 1972. On that date, the Petitioner-Plaintiff was interrogated by police, concerning the death of his estranged wife, Mildred, a prostitute, and asked to account for his actions and whereabouts on the night of her death. Later his automobile was searched and seized and subsequently he was arrested.

At his trial, defense counsel objected to the admissibility of statements obtained by the police from Schaffer on July 4, 1972, and the results of evidence obtained from the automobile search and seizure. The objections were denied by the three judge trial panel of Tolland County, Connecticut. Other issues involve the unconstitutionality of Connecticut's bench warrant statute, the denial of the accused's right to a jury trial by his peers, and the denial of the United States District Court of the Petitioner's request for an evidentiary hearing.

The Petitioner is currently serving a prison sentence of seventeen years to life imposed by the Trial Court, July 3, 1973.

#### ARGUMENT

##### I

The United States District Court erred by upholding the validity of the bench warrant issued against Petitioner Schaffer pursuant to Connecticut General Statutes Section 54-43 which is unconstitutional on its face.

A reading of the Fourth Amendment of the United States Constitution mandates "... no warrant shall issue, but upon probable cause, supported by oath or affirmation." It has been firmly established that the Fourth Amendment includes bench warrants, GIORDENELLO V. UNITED STATES, 357 U.S. 480 (1958), AGUILAR V. TEXAS, 378 U.S. 108 (1964), STATE V. LICARI, 153 Conn. 127, 214 A2d. 900 (1965).

However, Connecticut General Statutes, Section 54-43 as written makes no requirement that bench warrants be supported by oath or affirmation. The statute merely states, "Upon the representation of any state's attorney that he has reasonable ground to believe that a crime has been committed within his jurisdiction..." Connecticut General Statutes, Section 54-43 (addendum A).

As the Court is aware there is a great difference between an oath or affirmation and a mere representation. An oath is an "external pledge or assveration, made in verification of statements made, or to be made, coupled with an appeal to a sacred or venerated object..."

See IN RE: BENNETT, 233 F. Supp. 423, 427 (D.C. Mich. 1963). An affirmation is a form of an oath and therefore "Oath includes affirmation", BILDERBACK V. UNITED STATES, 249 F2d. 27 (6h Cir. 1957). However, the word "representation" means to exhibit or to state but not under oath or affirmation. UNITED STATES V. MARTINEZ, 73 F. Supp. 404 (D.C. Pa. 1957).

The instant Connecticut Statute does not require that a bench warrant application be sworn to or affirmed. Even if a state's attorney were to give an oath or affirmation, the warrant would be unconstitutional because no statute exists to enable such process to occur pursuant to the Constitution. It has been long held and established that "an unconstitutional law is void, and is as no law." EX PARTE SEIBOLD, 100 U.S. 371, 376-377, (1879)

U.S. EX REL. FLEMINGS V. CHAFFEE, 458 F2d. 544, 550 (2nd Cir, 1972) affirms the holding of EX PARTE SIEBOLD (supra) and re-states: "This doctrine - that convictions rendered by a court lacking either personal or subject matter jurisdictions are void - has been a fundamental part of our common law jurisdiction".

Thus the State of Connecticut never had jurisdiction over the Petitioner Schaffer. It has also been long established in Connecticut Courts that bench warrants must "... conform to Fourth Amendment requirements". This is true, of course, of proceedings under our bench warrant statute, Section 54-43, STATE V. LICARI, (supra). A bench warrant not supported by oath or affirmation was declared unconstitutional, the state legislature has done nothing in the past twelve years to amend this unconstitutional statute.

The contention of Petitioner-Schaffer is not that illegal evidence obtained by an illegal arrest should be excluded, but rather that the entire statute, Connecticut General Statute Section 54-43 is unconstitutional on its face. This claim should be subject to Federal Court litigation on the District Court level.

## II

The District Court erred by denying the claim of Petitioner Schaffer that he was subjected to unconstitutional searches and seizures of his motor vehicle.

A closer review of the trial transcript will reveal that the accused only consented to the search

of his motor vehicle not its seizure or road testing (T, 183, 185, 186, 187, 188, 190, 196, 197, 198, 199). There is no consent express or implied that the perimeter of the search included road testing. In fact after the vehicle was in possession of the police and tested, and only after that, was a warrant obtained (T, 190, 196, 197, 198, 199).

The District Court cites STONE V. POWELL, 49 L. Ed. 2d. 1067 (1976) with approval but fails to discuss and apply the case in its full context. The evidence obtained and presented at Schaffer's trial was circumstantial at best. No murder weapon was ever found (T, 326), and the road test of the automobile failed to be as conclusive as the state wished (T 310). All the state could produce at trial was that the automobile could execute a turn on the country road adjacent to where the body was found and that there was a paint chip from a license plate found on a rock near by. Not only were there more than one million similar license plates in Connecticut, but tests conducted upon paint scrapings presumably from Schaffer's car and the rock failed to substantiate that the two had touched. (T, 310). This physical

evidence is not reliable. In giving its rationale, the Court in STONE V. POWELL, 49 F Ed. 1079, 1085 (1976) explains, "Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant". In his concurring opinion Chief Justice Burger indicates that the exclusionary rule and its review by Federal Courts should not apply ... "as to reliable evidence - a pistol, a packet of heroin, counterfeit money, or the body of a murder victim." STONE V. POWELL, 49F. Ed. 1079, 1089 (1976).

Rather, the review by Federal Courts is discretionary. According to the majority in STONE V. POWELL (supra), "The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims". The instant appeal does not concern a situation where an illegal seizure produced a body, a smoking gun, or contraband. Rather it was the intent of the police to incriminate Schaffer, the husband of the victim, who was the only available suspect in an aging unsolved homicide. The evidence produced by the illegal seizure of Schaffer's automobile was weak, secondary, and could

have been obtained by applying for a warrant prior to seizing the car. There was no immediacy. This was not a case of close pursuit. Rather it was the exact method of police work that STONE V. POWELL (supra) concedes should be subject to Federal review.

In addition, the Connecticut Courts have not provided the opportunity for full and fair review of the trial. The state Supreme Court failed to follow and apply Connecticut case law. "When consent is claimed by the State to have rendered lawful an otherwise illegal search and seizure, the burden is on the state affirmatively to establish consent" STATE V. HANNA, 150 Conn. 457, 470, 191 A 2d. 124 (1963), "It might be that a consent to search, even if executed in writing, witnessed and notarized, would not be a truly voluntary act and unless consent is voluntary, it cannot be found STATE V. HANNA, 150 Conn. 457, 471". It also follows that where no great emergency existed and when the circumstances and number of officers present show determination to search "... it would seem that an objection or resistance on the part of the defendant would be a mere nullity." STATE V. TRUMBULL, 23, Conn. Sup. 41, 47-48, 176 A2d. 887 (1961). STATE V. DARWIN 25 Conn. Sup. 153, 198 A 2d. 715 (1964).

It becomes increasingly apparent that the right to fair review in Connecticut becomes doubtful especially when the State Supreme Court in the interest of upholding lower decisions attempts to justify the weak evidence submitted which was a product of suspect police work. This Honorable Court must not lose sight of the purpose of habeas corpus and its effect upon the state court's interpretation of protection of individual rights. "(T)he necessity that Federal Courts have the 'last say' with respect to questions of Federal Law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created fights..." are all important reasons for federal review in the instant case. See KAUFFMAN V. U.S., 394 U.S. 217, 225 (1969). "(T)he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." STONE V. POWELL, 49 L. Ed. 2d. 1067 at 1103. The Connecticut courts have not protected the Petitioner's rights against illegal and warrantless search and seizures

and in doing so have exposed this Petitioner as well as others to a system of futility that can only be corrected by Federal review.

### III

The District Court erred when it failed to find that statements made by Petitioner Schaffer to police officers while a suspect and entered into evidence were not violative of MIRANDA V. ARIZONA 384 U.S. 436 (1966).

That Mr. Schaffer was not the prime suspect of the homicide on the evening of July 4, 1972 is an over-generalization and not supported by the facts found by the trial court and the State Supreme Court (see STATE V. SCHAFFER, 168 Conn. 309, 362 A2d 893 (1975)). Statements were obtained from Schaffer before he was given his warnings pursuant to MIRANDA V. ARIZONA, 384, U.S. 436 (1966) which obliges that warnings be given the suspect when interrogated while in custody at the police station.

The record indicates that the State Police lured or ordered Schaffer to follow them to their barracks to answer some questions the evening of July 4, 1972.

The Petitioner, a black man, with an eighth grade education, in a predominately white county obeyed and was subjected to questioning in the presence of uninformed officers in a police station, after dark. It appears obvious that the investigation focused upon Schaffer. It is a well established principle by police that the usual suspect in a homicide is a family member or friend. In fact over eighty (80%) percent of the homicides in the United States are perpetrated by family members or close friends of the victim, (BAILEY V. ROTHBLATT, Investigation and Preparation of Criminal Cases, p. 380, 1970) (addendum B). This custodial interrogation was more than routine questioning. "Custodial interrogation" certainly includes all station house or police - car questioning initiated by the police, for there, the "potentiality of compulsion is obvious." U.S. V. GIBSON, 392 F 2d 373, (4th Cir, 1968). It follows that "the critical time under MIRANDA is when the individual is first subjected to police interrogation while in custody at the station FISHER V. SCAFATI, 314 F. Supp. 929, 932 (D. Mass, 1970)". Coupled with the circumstances that Mr. Schaffer was the prime suspect, that he was

a poorly educated black man in a predominately white county surrounded by uniformed police officers after dark at the station, he should have been given his MIRANDA warning. The fact that his trial consisted of largely circumstantial evidence makes the failure of these warnings and the admissibility of his admissions unconstitutional.

A reconstruction of the chain of events from the finding of the body of Mildred Schaffer the morning of July 4th to the interrogation of Kenneth Schaffer with commentary follows:

It is almost inconceivable that Kenneth Schaffer was not considered a suspect at the time of his interrogation at the State Police office on July 4, 1972. Earlier that day the police learned of the tire size and markings and the wheelbase size of an automobile present at the scene of the homicide. (T. 140, 143, 144 - 145).

It is evident that prior to the questioning of Schaffer, the police had a refined opinion of the description of the auto when they asked a witness to identify an automobile presumably similar to the above described auto. (T. 111).

To the complete surprise of the State Police, the husband of the victim appeared at the Vernon Police Station asking to identify the body. When asked how Schaffer knew of the death of this heretofore unknown victim he explained that he heard about it on the 6:00 p.m. Hartford news (T, 172, 173, 181). At that time, the State Police were probably unaware of the publicity (if any) accorded to this incident (T, 172, 173). It is interesting to note that it was not until 7:00 p.m. that the State Police met with Schaffer (T, 84, 85, 86). Certainly his prompt arrival at an area forty minutes away from Hartford might have made the State Police wonder whether the news was truly the source of Schaffer's knowledge (T, 72, 73).

Concluding that Schaffer was indeed a suspect, it was probable that his automobile was inspected and measured while he was indentifying the body of his wife at the hospital (T178). Further it is probable at the same time Schaffer's girl friend was questioned about Schaffer (T, 450).

What is certain that while Schaffer was being interrogated later at State Police Headquarters,

Sargeant Watson went outside to further inspect the auto. He noted that a window was broken and asked Schaffer's girlfriend, Bonnie Page who was sitting in the car, for an explanation (T, 175, 179, 180). In that it is admitted by the State Police that the Schaffer car was measured by Trooper Hutchinson, July 4th (T, 178), it becomes evident that this measurement took place prior to Schaffer's interrogation. If Bonnie Page and others were present in the auto while Schaffer was being interrogated and Sargeant Watson only examined the auto (T, 175, 179) during that time, then the only probable opportunity for Trooper Hutchinson to conduct measurements on the car was in secret while Schaffer and his friends were in the hospital indentifying the body.

There can be no doubt then that Schaffer was a suspect prior to his interrogation. The police had in their possession confirmed information that the tire marks and wheel base of the Schaffer auto conformed to the homicide scene auto tracks. Prior to this, they had questioned Schaffer's surprise unsolicited appearance to indentify the body (T, 181, 172).

The actions, rather than trial conclusions, of the police are strong evidence that Schaffer was a suspect at that time. Even after the vehicle was inspected and the girlfriend interrogated about Schaffer, no attempt was made to give the defendant his rights. There was no problem in communication, rather the police allowed this uneducated black man to incriminate himself. When one looks at this scenario it is obvious that the substance of the police motive was devious incrimination masqued and obscured by allegations that Schaffer was not a suspect. This insidious violation of the Relator's constitutional rights should not remain unremidied.

#### IV

The District Court erred when it failed to grant an evidentiary hearing pursuant to 28 U.S.C. Section 2254 (d).

The District Court is in error because it failed to consider whether it was obliged to hold an evidentiary hearing as motioned by the Petitioner-Schaffer. (A 28, 29, 30 - 34). State factual determination is not supported by the record, nor was the Petitioner-Schaffer given the opportunity to present any new

evidence which he had. The rule in TOWNSEND V. SAIN 372 U.S. 293, 9 (1963) has not been followed in the above cases. The District Court could not know whether any of the six criteria in TOWNSEND V. SAIN (supra) existed because it never obtained argument by counsel, but rather dismissed the petition instead. The Petitioner was not given an opportunity to make a showing that he was entitled to an evidentiary hearing and clearly there was probable cause for such hearing, as the trial transcript indicates (supra).

V

The District Court did err by refusing to grant the claim of Petitioner Schaffer that through mistake of counsel there was no Motion for Change of Venue in order that the Petitioner could be tried by a jury of his peers.

Pursuant to 28 U.S.C. Section 2254 (b), a Petitioner must exhaust all of his state remedies before seeking remedies in Federal Courts. This, the Petitioner clearly did. His Habeas Corpus Motion was denied by the Connecticut Superior Court, Alexander, J. (addendum C) and his appeal was denied by the

Connecticut Supreme Court , STATE V. SCHAFFER, 168 Conn. 309, 362, A2d. 893 (1975).

It is the contention of the instant District Court that the above issue was never fully litigated in the State Court system. The Petitioner has petitioned the Connecticut Superior Court for a Writ of Habeas Corpus and the Connecticut Supreme Court on appeal.

Furthermore, relief is still claimed under amended petitions herein because pursuant to 28 U.S.C., Section 2254 (b), the following circumstances rendered the state corrective process ineffective to protect the rights of the prisoners.

First, being an indigent, Schaffer could not pay for pre-trial and trial counsel, therefore he relied upon the State of Connecticut to appoint counsel. State appointed counsel then withdrew his jury claim and requested a trial by three judge panel.

As a black man to be tried in an overwhelmingly white county, the Petitioner would not be tried by his peers. Counsel should have requested a change in venue under the theory of EUBANKS V. LOUISIANA, 356 U.S. 584, 2 L. ed. 2d 991, 78 S. Ct. 970 (1958) that the non-appearance of blacks on the jury panel would be evidence

of discrimination.

However it has been impossible to litigate this issue in the state court system because Schaffer was represented by state appointed counsel and such counsel would not be presumed to appeal on grounds of its own mistake. The Petitioner has demonstrated that pursuant to 28 U.S.C. Section 2254 (b), that he has either exhausted all state remedies by virtue of his his state habeas corpus motion and appeal of verdict to the State Supreme Court. Furthermore, it would have been impossible to utilize the state corrective process, in that the Petitioner's state appointed counsel would not have made his own judgment the subject of an appeal or habeas corpus motion.

#### CONCLUSION

For the foregoing reasons, the Appellant submits that the District Court should be over-ruled in all respects.

Respectfully submitted

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